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Nos. 85-792 and 85-793

In the Supreme Court of the United States

October Term, 1985

INTERSTATE COMMERCE COMMISSION,
Petitioner,

vs.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Respondents.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner,

vs.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS

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SUPPLEMENTAL BRIEF OF RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS

This brief is submitted by respondent Brotherhood of Locomotive Engineers ("BLE") in response to the following question posed by the Court in its Order dated December 1, 1986:

> "In view of 28 U.S.C. Section 2344, 49 U.S.C. Section 10327(i), and the passage of more than 60 days between (1) respondents' appeals from the In-

terstate Commerce Commission's October 25, 1983, order, declining to reconsider its May 18, 1983, order regarding respondent Brotherhood of Locomotive Engineers' motion for clarification, and (2) service of the Commission's May 18, 1983, clarification order, did the appeals properly bring before the reviewing court the May 18, 1983, order?

On April 4, 1983, BLE filed a petition with the ICC for clarification of the Commission's consolidation order with respect to employee protective conditions. The ICC denied this petition in a decision bearing service date of May 18, 1983. On May 31, 1983, BLE filed a petition for reconsideration which was denied in a decision served on October 25, 1983. On December 16, 1983, BLE filed a petition to review the decisions on its petition for clarification and its petition for reconsideration.

BLE submits that the appeals did properly bring before the court of appeals the May 18, 1983 order denying BLE's petition for clarification. In view of BLE's timely filing of a petition for reconsideration, the sixty-day period for review provided in 28 U.S.C. §2344 (the Hobbs Act) did not commence running until the Commission ruled upon the petitions for reconsideration. Moreover, regardless of tolling considerations, the ruling on the merits raised by the petition for reconsideration brought the May 18, 1983 order within the scope of review of the court below.

1. The above view is consistent with the decisions of this Court. The Court in *Civil Aeronautics Board v. Delta Air Lines*, 367 U.S. 316, 326 (1961), embraced "the general notion that an administrative order is not 'final,' *for the purposes of judicial review*, until outstanding petitions for reconsideration have been disposed of." (Emphasis in original). Later, the Court, quoting with approval from

Outland v. Civil Aeronautics Board, 284 F.2d 224, 227 (D.C. Cir. 1960), said: "Unless Congress provides otherwise, '[w]here a motion for rehearing is in fact filed there is no final action until the rehearing is denied.'" *See American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 541 (1970). Furthermore, as the dissenting opinion below by Judge MacKinnon noted, if the ruling upon BLE's petition for reconsideration is considered a ruling on the merits, the "decision on the merits of the motion for reconsideration could extend the time period for seeking appellate review." 761 F.2d 714, at 728. This observation was based upon this Court's decision in *Bowman v. Loperena*, 311 U.S. 262 (1940), which involved the timeliness of an appeal from an order adjudicating the debtor bankrupt. This Court held:

> The filing of an untimely petition for rehearing which is not entertained on its merits, or a motion for leave to file such a petition out of time, if not acted upon or if denied by the trial court, cannot operate to extend the time of an appeal. But where the court allows the filing and, after considering the merits, denied the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof. (*Id.* at 266). (Footnotes omitted).

In sum, two propositions appear to evolve from these rulings. First, the litigant is left the choice whether to exhaust administrative remedies or to immediately seek judicial review; and considerations of judicial economy dictate that when a petition for reconsideration is filed, review may properly be deferred because the order may be modified in a way making judicial review unnecessary. Second, where an untimely petition for reconsideration of agency

action is considered and denied on the merits, the time period for judicial review of the original order begins to run from the denial of reconsideration.

2. That the appeals properly brought the May 18, 1983 order before the reviewing court is sustained by the legislative history of the involved statutory provisions and the case law applicable thereto.

a. ICC orders first became reviewable under the Hobbs Act in 1975. Pub. L. 93-584, January 2, 1975, 88 Stat. 1917. According to Congress, one of the advantages in bringing ICC orders under 28 U.S.C. §2344 was that "litigants and judges would have the benefit of an established procedure with a sizeable body of interpretative case law that has served efficiently and with general approval for nearly 20 years." 1974 U.S. Code Cong. and Adm. News, pp. 7034, 7037.

The case law developed under 28 U.S.C. §2344 prior to 1975 and therefore applicable to judicial review of ICC orders provided that the sixty-day period for review did not begin to run until the agency had acted upon petitions for reconsideration. Among the cases Congress intended to apply to judicial review of ICC orders were *American Civil Liberties Union v. Federal Communication Commission*, 486 F.2d 411 (D.C. Cir. 1973), and *Montship Lines Ltd. v. Federal Maritime Board*, 295 F.2d 147 (D.C. Cir. 1961). In both cases, the petitioners sought judicial review more than sixty days from issuance of the initial orders but within sixty days from denial of petitions for reconsideration. In the *Montship Lines* case, the court relied upon *Outland v. Civil Aeronautics Board*, 284 F.2d 224 (D.C. Cir. 1960), in finding the petition to review the initial order had been timely filed. The latter case involved a petition to review an order of the CAB under 49 U.S.C. §1486(a), which provided a sixty-day period

of review analogous to that in the Hobbs Act. In holding that the petitions to review properly brought before the court the order complained of, Chief Justice Burger, speaking for the Court of Appeals, stated that a contrary conclusion would encourage " 'protective' petitions for judicial review" and a "whole train of unnecessary consequences," and, therefore, concluded that "when a motion for rehearing is made, the time for filing a petition for review does not begin to run until the motion for rehearing is acted upon by the Board." *Id.* at 228.

b. Shortly after placing the method of review of ICC decisions under the Hobbs Act, the Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"). Pub. L. 94-210, Feb. 5, 1976, 90 Stat. 31. The purpose of the 4-R Act was to promote the revitalization of the railroad industry through an overhaul of the regulatory system by procedural reforms that would expedite Commission proceedings. Section 203(a) of the Act also revised section 17(9) of the Interstate Commerce Act by inserting a subsection (h), which has since been slightly altered and recodified as 49 U.S.C. §10327(i) and reads:

> Notwithstanding this subtitle, an action of the Commission under this section and an action of a designated division under subsection (c) of this section is final on the date on which it is served, and a civil action to enforce, enjoin, suspend, or set aside the action *may* be filed after that date. (Emphasis supplied).

The analogous provision to section 10327(i) is contained in 5 U.S.C. §704 [formerly 5 U.S.C. §1009(c)] of the Administrative Procedures Act. In *Outland v. Civil Aeronautics Board*, 284 F.2d 224, at 227 (D.C. Cir. 1960),

the court established that 5 U.S.C. §1009(c) was adopted to achieve harmony with this Court's holding in *Levers v. Anderson*, 326 U.S. 219 (1945), that a motion for rehearing was not necessary to exhaust administrative remedies. However, distinguishing between the question of exhaustion and the question of the need to file a petition for review within sixty days regardless of the availability of discretionary appeals, that court said that "[w]here a motion for rehearing is in fact filed there is no final action until the rehearing is denied." 284 F.2d *supra*, 227.

Shortly thereafter, in *Samuel B. Franklin & Co. v. Securities and Exchange Commission*, 290 F.2d 719, at 725 (9th Cir. 1961), *cert. denied*, 368 U.S. 889 (1961),[1] the Ninth Circuit found that the "legislative history of 5 U.S.C.A. §1009(a) convinces us that the section was intended to mean only that it was not necessary to file a petition for rehearing in order to be eligible to obtain judicial review." Although noting that "an agency's order is 'final' in that it is a proper basis for court review without more" (*id.*, 723), the court held "the timely filing of a petition for agency reconsideration does toll the sixty-day period for appeal to this court and that an appeal taken within sixty days from the termination of the petition for reconsideration by the agency is timely." *Id.*, at 725.

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1. In this case, the Ninth Circuit overturned its prior holding in *Consolidated Flower Shipments, Inc. v. Civil Aeronautics Board*, 265 F.2d 449 (9th Cir. 1953), that former 5 U.S.C. §1009(c) required review petitions to be filed within sixty days of an agency decision notwithstanding further rulings on reconsideration. Even though the legislative history showed that Congress merely intended to embody prior case law, which held that a motion to reconsider extended the time to appeal, the court declined to consider that history on the basis that the statutory language was unambiguous.

The rationale of these cases was followed in *Commonwealth of Pennsylvania v. ICC*, 590 F.2d 1187 (D.C. Cir. 1978), which arose from the requirement placed upon the ICC in then 49 U.S.C. §15(8)(a) by section 202(e)(2) of the 4-R Act to render a final decision within seven months after the filing by a railroad of a tariff charge. Two days prior to the expiration of the statutory period, an order approved the tariff requested by the carrier. The Commonwealth petitioned for reconsideration within the thirty-day period specified in the ICC's rules of procedures, but the ICC denied the petition on the ground that it lacked jurisdiction due to the expiration of the seven-month period.

On appeal, "[t]he ICC acknowledged that usually a party has sixty days from the denial of a Petition for Reconsideration to file for judicial review," but contended that the new seven-month requirement superseded the usual review procedures. *Id.*, 1192. Rejecting this argument, Judge MacKinnon, speaking for the court, pointed out that while the 4-R Act intended to speed up the often dilatory deliberations of the ICC by imposing a seven-month deadline, the legislative history did not make any reference to any need to expedite the process of judicial review. *Id.* at 1194, n.23. Judge MacKinnon also said that there was no indication "that Congress considered it advisable to force the expedition of judicial review of Commission orders by * * * not allowing the pendency of such a petition [for reconsideration] to toll the running of the Hobbs Act." *Id.*, 1194. Therefore, the court held that since "the Hobbs Act period was tolled during the pendency of a petition for reconsideration, * * * petitioner will have sixty days to file for judicial review after the disposition of this motion for reconsideration." *Id.* at 1196, n.32.

c. Judicial determinations following 1975 confirm that the sixty-day period for review of ICC orders does not begin to run until the ICC acts upon petitions for reconsideration. For example, in *B.J. McAdams, Inc. v. ICC*, 531 F.2d 1112 (8th Cir. 1977), the ICC's review board denied an application by McAdams to transport candy. McAdams filed a petition for reconsideration that the ICC denied as an appellate division, which rendered its decision administratively final. Instead of seeking judicial review, McAdams filed a discretionary appeal for a declaration that the issue involved a matter of general transportation importance, *i.e.*, a "GTI petition." After denial of that petition, McAdams filed a petition for review.

The Eighth Circuit held that "[e]ven though the filing of a GTI petition is discretionary and not required to exhaust administrative remedies, definite policy reasons reflect that judicial review should be postponed until a pending GTI petition has been ruled upon." *Id.*, 1114-15. (Citations omitted). The court pointed out that otherwise the court and the agency would possess simultaneous jurisdiction and that its decision, therefore, furthered "the interest of judicial economy and agency responsibility."

The Eighth Circuit followed *McAdams* in *Cartersville Elevator, Inc. v. ICC*, 724 F.2d 668 (8th Cir. 1984). In *C.O.D.E., Inc. v. ICC*, 768 F.2d 1210 (10th Cir. 1985), the Tenth Circuit relied upon *McAdams* in holding the statutorily prescribed review period is tolled until the ICC issues its final decision on the petition for reconsideration. *See also Aeromar C. Por. A. v. Department of Transportation*, 767 F.2d 1491, 1493 (11th Cir. 1985), which held a petition to review was prematurely filed where the petition for reconsideration was pending because

"[a]fter the filing of a petition for reconsideration of a FAA order, there is no 'definitive statement on the subject matter' of the order until the petition is denied"; and *Cities of Newark, New Castle and Sanford, Delaware v. Federal Energy Regulatory Commission*, 763 F.2d 533 (3d Cir. 1985).

3. The ICC's ruling on the merits of BLE's petition for reconsideration also brought the May 18, 1983 order within the court's scope of review. In conformity with the principles established by this Court in *Bowman v. Loperena*, 311 U.S. 262 (1940), the various courts of appeals have permitted review of agency orders otherwise time barred when the agency subsequently ruled on the merits of a petition for reconsideration for which a timely review had been filed. *See, e.g., Tallman v. Udall*, 324 F.2d 411 (D.C. Cir. 1963), *reversed on other grounds*, 380 U.S. 1 (1964), *reh. denied*, 380 U.S. 989 (1964); *National Insulation Transportation Committee v. ICC*, 683 F.2d 533, at 543 n.17 (D.C. Cir. 1982) (finding petition to review timely where the agency reopened its decision and considered issues closely interrelated with its prior decision); *Lloyd v. Department of Labor*, 637 F.2d 1270, 1274-75 (9th Cir. 1980) (held petition to review initial order timely because the agency "addressed the substantive arguments" of a petition for reconsideration for which a timely petition for review had been filed).

Accordingly, in light of the Commission's rulings on the merits in entering its decision upon the petitions for reconsideration, BLE's petition to review is timely as to both the May 18, 1983 and October 25, 1983 orders.

CONCLUSION

Based upon the above reasons and authorities, respondent Brotherhood of Locomotive Engineers submits that the appeals properly brought the May 18, 1983 order before the reviewing court.

Respectfully submitted,

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